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CRIMINAL ASPECTS OF CORPORATE LAW: STATE AND FEDERAL

RICHARD R. BOOTH*

IN GENERAL

Even a non-lawyer could not help but be aware that the greater part of the business carried on within the framework of our present day economy is conducted by and through the use of the corporation, a creature of the law, an intangible jural personality. As the French say, however, *il n'y a pas de rose sans epines*,¹ and one of the thorns in the side of the corporate entity is its amenability to criminal prosecution and the effect of this property on those natural persons connected with the corporation.

When corporations were in their infancy and the fiction of the corporate entity was not a familiar concept, it was maintained that a corporation could not be indicted and convicted of a crime. There are indications that such eminent jurists as Lord Chief Justices Holt² and Blackstone³ subscribed to this theory. This proposition has, of course, dissolved into nothingness over the years, and today the statutes, cases and other authorities proclaim the opposite to be true.⁴ These historical considerations were discussed at length in a decision of the United States Supreme Court,⁵ and a fairly recent Florida case⁶ indicates that our state is in step with the times on the question of criminal liability of corporations.

A corporation cannot be charged with a crime unless the prescribed punishment can be applied to the juristic person; for instance, if the sole penalty is death or imprisonment a corporation cannot be charged with the crime.⁷ If a fine is prescribed, or fine, imprisonment or both, there is no difficulty and the corporation is amenable to punishment for that crime, unless, of course the corporation is otherwise exempt.⁸

The contention that a criminal statute which provides for a fine and imprisonment for a violation by an individual and a fine when the cor-

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1. There is no rose without thorn.

2. Anonymous, 12 Mod. 559, 88 Eng. Reprint, 1164.

3. 1 Blackstone, Commentaries *476.

4. FLETCHER, CYC. CORP. § 4942 (Perm. Ed. 1947); 13 AM. JUR., Corporations § 1132 (1938); 19 C.J.S., Corporations § 1358 (1940).

5. N.Y. Central & H. River R.R. v. United States, 212 U.S. 481 (1908).

6. Losey v. Willard, 54 So.2d 183 (Fla. 1951).

7. State ex rel Kropf v. Gilbert, 213 Wis. 196, 251 N.W. 478 (1933). This is on the theory that the law does not permit or require that which is futile.

8. FLETCHER, CYC. CORP. § 4946 (Perm. Ed. 1947); For interesting discussions on the use of the writ of quo warranto in connection with criminal acts of corporations, see 76 U. OF PA. L. REV. 310 (1928) and 37 YALE L.J. 237 (1927).

poration is the guilty party is unconstitutional as denying equal protection of the laws has made no headway in the courts.⁹

Crimes involving personal violence, such as assault and battery, riots, etc., and those involving personal participation such as rape, adultery and bigamy, have been held not to apply to corporations; however, a corporation has been held liable for manslaughter.¹⁰

Formerly it was almost universally held that a corporation could not be convicted of a crime which involved malice or evil intent, but the rule today seems to be that a corporation can be held for a crime in which a specific intent is a necessary element. The courts apparently think that it is no more difficult to impute a specific intent to a corporation in a criminal case than in a civil case.¹¹ It has been said that there are certain crimes which are "so far ultra vires" that a corporation cannot commit them,¹² but under the modern tendency to hold corporations for crimes, it would seem that only those crimes which under no circumstances could be committed for the benefit of the corporation or in pursuance of a corporate purpose are really exempt from application of the modern doctrine, provided always, that a corporation can be subjected to the prescribed punishment.¹³

A corporation being a juristic personality, or as one judge put it, an "unknowable somewhat," a mere fiction, it can only act through its officers and agents; therefore, any criminal liability imposed upon a corporation is the result of compounding a fiction, so to speak; it is a derivative or imputed liability. A corporation is chargeable with the knowledge of its officers, if knowledge is an element of a crime,¹⁴ and the guilty intent of

9. *State v. Belle Springs Creamery Co.*, 83 Kan. 389, 111 Pac. 474 (1910); *Small & Co. v. Commissioner*, 134 Ky. 272, 120 S.W. 361 (1909).

10. *United States v. Van Schaick*, 134 Fed. 592 (S.D.N.Y. 1904); *Losey v. Willard*, note 6 *supra*; *State v. Lehigh Valley Ry.*, 90 N.J.L. 372, 103 Atl. 685 (1917); see also *People v. Orzel*, 263 N.Y. 200, 188 N.E. 648 (1934).

11. *N.Y. Central & H. River R.R. v. United States*, 212 U.S. 481 (1908); *Telegram Newspaper Co. v. Commissioner*, 172 Mass. 294, 52 N.E. 445 (1899). In *State ex rel. Losey v. Willard*, 54 So.2d at 185 (Fla. 1951), the court said:

In recognition of this rule the courts have held a corporation subject to prosecution for obstructing a highway, *Palatka & I. R.R. Co. v. State*, 23 Fla. 546, 3 So. 158; for obtaining money by false pretenses, *State v. Salisbury Ice & Fuel Co.*, 166 N.C. 366, 81 S.E. 737, 52 L.R.A. (n.s.), 216; for criminal libel, *People v. Star Co.*, 135 App. Div. 517, 120 N.Y.S. 498; for selling beer to a known intoxicant in violation of statute, *Stewart v. Waterloo Turn Verein*, 71 Iowa 226, 32 N.W. 275; for criminal conspiracy, *State v. Eastern Coal Co.*, 29 R.I. 254, 70 Atl. 1, U.S. v. Nearing, D.C., 252 F. 223; for grand larceny, *People v. Canadian Fur Trappers' Corporation*, 248 N.Y. 159, 161 N.E. 455, 59 A.L.R. 372; for usury, *State v. Security Bank of Clark*, 2 S.D. 538, 51 N.W. 337; for selling butter under the statutory weight, *State v. Belle Springs Creamery Co.*, 83 Kan. 389, 111 P. 474, L.R.A. 1915 D, 515.

12. E.g., *Androscooggin Water Power Co. v. Bethal Steam-Mill Co.*, 64 Me. 441 (1875) (Larceny); but see *People v. Canadian Fur Trappers' Corp.*, 248 N.Y. 159, 161 N.E. 455 (1928).

13. See FLETCHER, *CYC. CORP.* § 4960 (Perm. Ed. 1947) and cases there cited.

14. *United States v. Empire Packing Co.*, 174 F.2d 16 (7th Cir. 1949), *cert. denied* 337 U.S. 959 (1949).

an officer is imputed to the corporation in order to prove the guilt of the corporation.¹⁵ Statutes have been enacted which provide that the commission by corporate officers of criminal violations, acting within the scope of their employment, is imputed to the corporation, and the corporation is then subject to criminal prosecution.¹⁶ Such a provision has been held to be constitutional.¹⁷

Criminal statutes customarily begin by saying, "Any person who . . .," or "It shall be unlawful for any person to . . .," or "Whoever. . . ." It then becomes important to define the words "person" and "whoever." Definitions of these terms are usually found in the general provisions of the statutes. For example Title 1 section 1 of the United States Code contains the following definition:

In determining the meaning of any Act of Congress, unless the context indicates otherwise— . . . the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. . . .

Florida Statutes contain a similar provision,¹⁸ and the cases have generally held corporations to be within the meaning of the term.¹⁹

CONSTITUTIONAL CONSIDERATIONS

There are certain constitutional considerations which become important to corporations when they become involved with the authorities, for the word "person" appears in various sections of both the United States and Florida Constitutions.

The particular provisions of the United States Constitution which bear consideration are the fourth, fifth, sixth and fourteenth amendments. The safeguards preserved to persons by those sections should be of acute and vital interest to individuals who do business through corporations; not only do they concern the rights of the corporations as entities, but the derivative effect on the personal rights of the individuals who act in various capacities as officers, directors and agents of corporations, and the stockholders thereof.²⁰

The courts have logically held that where property rights are concerned the word "person" as used in the fifth and fourteenth amendments of the United States Constitution includes the juristic entity as well as the natural person;²¹ whereas, where "life" and "liberty" are concerned there

15. *Minisohn v. United States*, 101 F.2d 477 (3d Cir. 1939).

16. *E.g.*, 32 STAT. 847 (1903), 49 U.S.C. § 41 (1952).

17. See note 5 *supra*.

18. FLA. STAT. § 1.01 (1955).

19. *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 75 Pac. 924 (1904).

20. *Wilson v. United States*, 221 U.S. 361 (1911).

21. See *Railroad Tax Cases*, 13 Fed. 722 (C.C.D. Cal. 1882); see also *Santa Clara County v. Southern Pac. Ry.*, 18 Fed. 385 (C.C.D. Cal. 1883), *aff'd* 118 U.S. 394 (1886). See also 13 AM. JUR., *Corporations* § 10 (1939).

is no applicability to corporations.²² It has been held that a corporation is entitled to the protection of the fourth amendment against unreasonable search and seizures of its papers.²³ Usually consideration of this last-mentioned right is tied in with the question of whether a corporation can be required to give evidence which would be self-incriminating. Of course, it is a familiar proposition that a natural person cannot be compelled to do so, but this is not the rule with corporations. It has long since been settled that the privilege against self-incrimination as guaranteed by the fifth amendment and similar provisions of state constitutions does not extend to corporations.²⁴ This proposition conceded, the search and seizure provision of the fourth amendment becomes a *brutum fulmen*²⁵ as far as corporations are concerned, for the relevant corporate records can be obtained by the grand jury under proper subpoena at any time.

Section twelve of the Declaration of Rights of the Florida Constitution²⁶ enumerates safeguards which inure to the benefit of those accused of a crime in Florida. They follow generally those guarantees found in the fifth amendment of the United States Constitution, and except where reference is made to the personal rights, the provisions are equally applicable to corporations and individuals.²⁷

Thus we have a situation obtaining in the federal and state courts where the constitutional right of an individual with respect to his privilege of not being required to be a witness against himself is wiped out for all practical purposes when that individual has been accomplishing his transgressions behind the corporate veil. If the records of the corporation would disclose his questionable activities, his cause would seem hopeless. A corporate officer may not refuse lawful process directed at the production of corporate records on the ground that entries therein might tend to incriminate him.²⁸

In addition to the power of process there is the visitorial power of the state under the laws of which the corporation is chartered and/or does business. As a condition of the franchise to do business, the state can demand to see and inspect the books and records of any such corporation, and if an inspection reveals a criminal violation this information may be

22. See note 21 *supra*.

23. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906); *Bowles v. Beatrice Creamery Co.*, 56 F. Supp. 805 (D.C. Wyo. 1944) *reversed* on other grounds 146 F.2d 774 (1944); *United States v. Antonelli Fireworks Co.*, 53 F. Supp. 870 (D.C. N.Y. 1943).

24. *Baltimore & Ohio R.R. v. ICC*, 221 U.S. 612 (1911); *Hale v. Henkel*, *supra* note 23; *Wilson v. United States*, *supra* note 23; *In re Bornn Hat Co.*, 184 Fed. 506 (1911), *aff'd* 223 U.S. 713 (1912).

25. Empty noise.

26. *Losey v. Willard*, 54 So.2d 183 (Fla. 1951); *Seaboard Air Line Ry. v. Simon*, 56 Fla. 545, 47 So. 1001 (1908).

27. See note 19 *supra*.

28. *Wilson v. United States*, note 23 *supra*.

made available to the proper authorities for appropriate action by way of process. Thus we have this additional monitor keeping corporate officers and agents in line.

In the author's experience of prosecuting violations of federal criminal statutes, proof of a violation by an individual has been greatly facilitated by reason of the existence and availability of incriminating corporate records. Quite often the government is not interested in prosecuting the corporation for various reasons,²⁹ but the fact that there is a corporation in the picture provides the prosecution with a convenient conduit of evidence which otherwise would not be available.

A secondary, but very valuable advantage to be gained by the prosecutor and the investigative agency involved, in cases where corporate records are available for proof of the crime, is the existence in such records of leads to further evidence and witnesses which may be developed therefrom.

PROCEDURAL CONSIDERATIONS

Being entitled to due process of law and certain procedural guarantees of the state and federal constitutions when they are respectively applicable, the corporation must be criminally proceeded against according to the prescribed rules of procedure and pertinent statutes.

With respect to federal violations, a person, including a corporation, may be accused of a felony by indictment of the grand jury, or by information filed by the United States Attorney if indictment is waived, and for a misdemeanor by way of information as aforesaid.³⁰ In each case the formal accusation, whether by way of indictment or information, is based on "probable cause"; that is, formal accusation will be made if there is a showing by competent evidence that there is probable cause to believe that the subject committed the crime. As a practical matter the decision rests with the United States Attorney in either case, for if he is not convinced that he would have a reasonable chance of success in court the case would not normally be presented to the grand jury, but the grand jury may indict independent of the wishes of the district attorney.

As has been stated before, the grand jury can require the production of corporate records by appropriate process, and a corporation cannot refuse to produce them.³¹ A refusal by the custodian of such records to produce them under subpoena duces tecum renders such custodian subject to contempt proceedings.³² It is now generally held that a corporation is also amenable to contempt proceedings despite the intangibility of its

29. The corporation may be out of business, or without funds, or merely the alter ego of an individual defendant.

30. FED. R. CRIM. P. 7.

31. 13 AM. JUR., *Corporations* § 10 (1938); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). (Two cases) *affirming* 147 F.2d 658 (10th Cir. 1945); 148 F.2d 57 (3d Cir. 1945); *Hale v. Henkel*, note 23 *supra*; *United States v. Wilson*, note 23 *supra*.

32. See 18 U.S.C. § 401 (1952); see also *Wilson v. United States*, note 23 *supra*.

person.³³ In one case a parent company was held amenable to punishment for the contempt of its subsidiary because of the relationship which existed between the parent and its subsidiaries.³⁴ In order for an officer of a corporation to be held for contempt it is not necessary that the subpoena duces tecum be directed to him personally; it is sufficient if it is directed to the corporation and he is the custodian.³⁵

When an indictment or an information has been filed against a corporation the formal procedure can be considered to have begun. With respect to a federal criminal case, the corporate defendant is brought before the court to be arraigned by service of a summons.³⁶ The summons states where and when the corporation shall appear. If no appearance is then made, the rules provide that a plea of "not guilty" shall be entered.³⁷ It is provided elsewhere in the rules that a corporation may appear by counsel for all purposes,³⁸ thus it is not required that any of the officers be present at any stage of the proceedings at arraignment, at trial, or at time of sentence. It is an unusual case, however, where the corporation is the sole defendant; by virtue of the intangible character of the jural person most cases against a corporation will have as additional defendants those individuals who have participated in the crime.

Procedure in the Florida criminal courts is much the same as procedure under the federal rules. There are no Florida rules of criminal procedure as such; rather, the procedure is set out in a series of statutes known collectively as the Criminal Procedure Act.³⁹

The procedural aspects of a criminal case against a corporation in the Florida courts are substantially similar to those of a federal criminal case: service is by summons;⁴⁰ the plea is automatically "not guilty" if the corporation fails to appear,⁴¹ and there apparently is no requirement that the corporate officers be present during the proceedings.

One difference to be noted is in the method of formally charging a corporation with a felony. The case may proceed either by indictment by the grand jury or by way of information under oath filed by the prosecuting attorney.⁴² At common law it was not necessary that an information be verified under oath.⁴³

33. *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541 (1908); *Palm Shores, Inc. v. Nobles*, 149 Fla. 103, 5 So.2d 52 (1941); *State v. Baltimore & Ohio R.R.*, 73 W. Va. 1, 79 S.E. 834 (1913).

34. *Detroit Motor Appliance Co. v. General Motors Corp.*, 5 F. Supp. 27 (E.D. Ill. 1933).

35. *Wilson v. United States*, 221 U.S. 361 (1911).

36. *FED. R. CRIM. P.* 9 (c)(1).

37. *FED. R. CRIM. P.* 11.

38. *FED. R. CRIM. P.* 43.

39. *FLA. STAT.* § 901.01 through § 925.03 (1955).

40. *FLA. STAT.* §§ 901.02, 907.03 (1955).

41. *FLA. STAT.* §§ 901.14, 908.03 (1955).

42. *FLA. STAT.* § 904.01 (1955).

43. *Williams v. Albritton*, 139 Fla. 195, 190 So. 423 (1939).

When an individual defendant fails to appear at the time set for trial in federal court his bond, if any, is declared estreated, and a bench warrant is issued for his arrest; however, when a corporate defendant fails to appear the very character of the corporation's fictional personality prevents its arrest. In such a situation a rule to show cause may issue to the officers of the corporation directing that they appear and state to the court the reason for the corporation's failure to appear; disobedience of such an order is grounds for contempt action against such officers.⁴⁴ The corporation's failure to appear as ordered could be grounds for a contempt action and result in a fine.⁴⁵

In the alternative the court can declare the corporation in default and proceed to hear the evidence against the corporation and pronounce judgment and sentence. It has been held that a criminal proceeding against a corporation is conducted, so far as notice, appearance, hearing and judgment are concerned, as though it were a civil case.⁴⁶

CRIMINAL LIABILITY OF OFFICERS, DIRECTORS AND AGENTS

Generally speaking the officers, directors and agents of a corporation are individually criminally liable for acts performed by them in behalf of the corporation.⁴⁷ The basis for criminal liability of other officers, directors or agents is essentially consent⁴⁸ or participation. This may be as a principal, accessory or conspirator.

In many jurisdictions the distinction between accessories and principals has been abolished.⁴⁹ There is a specific federal statute on this point;⁵⁰ on the other hand, the Florida statutes⁵¹ provide for different degrees of participation as accessory before the fact, principal in the first degree, principal in the second degree and accessory after the fact.⁵²

In addition to being charged with complicity in the substantive crimes, persons acting on behalf of corporations may find themselves charged with conspiring with other corporate personnel or the corporate entity itself in the commission of offenses against the people. There are

44. See *United States v. John Kelso Co.*, 86 Fed. 304 (N.D. Cal. 1898); 18 U.S.C. § 401 (1952). This method of handling the situation is apparently available in all jurisdictions as a general power of the courts to enforce their orders.

45. 18 U.S.C. § 402 (1952).

46. *Acme Poultry Corp. v. United States*, 146 F.2d 738 (4th Cir. 1945); *cert. denied* 324 U.S. 860 (1945).

47. FLETCHER, *CYC. CORP.* § 1348 (Perm. Ed. 1947).

48. *Id.* at § 1349.

49. 14 AM. JUR., *Corporations*, §§ 72, 79, 95 (1938).

50. 18 U.S.C. § 2 (1952); see *Kelly v. United States*, 258 Fed. 392 (6th Cir. 1919); *cert. denied* 249 U.S. 616 (1919).

51. FLA. STAT. § 73 (1955).

52. See *Dye, Parties to Criminal Offenses*, 22 FLA. STAT. ANN. § 73 (1955). Mr. Dye's article is pertinent to this discussion insofar as it may be applicable to the criminal liability of officers, directors and agents of a corporation alleged to be involved in the commission of a crime in their respective capacities as such.

specific provisions in the Federal Criminal Code⁵³ and in the Florida statutes⁵⁴ making certain types of conspiracies crimes in themselves. Each of these statutes makes it an offense to conspire to commit an offense, and the commission of the substantive crime and a conspiracy to commit the substantive crime are separate and distinct offenses.⁵⁵ As a matter of practice a defendant is frequently charged with both the substantive offense and conspiracy to commit the same. Since it takes at least two persons to form a conspiracy, in counting the conspirators a corporation may be counted as one of the conspirators.⁵⁶ This practice has been attacked as illogical and manifestly unfair, one writer⁵⁷ stating:

But the doctrine that an individual, though he does not in any way communicate or act in conjunction with another mortal soul, may nevertheless by his wrongdoing be abetting or conspiring with that immortal entity, the corporation, is one of those peculiar judicial fancies that, were it not for the desirable results often achieved by their use, would be unqualifiedly condemned by all save those whose naive faith in the metaphysician's logic cannot be disturbed by earthly facts.

Interesting situations sometimes develop when a corporation and its officers are charged in the same indictment for conspiracy to commit offenses. The justification for the conviction of the officers and the acquittal of the corporation can be found in the case of *United States v. Hare*,⁵⁸ and the case of *American Medical Ass'n v. United States*⁵⁹ presents the rationale for the acquittal of the officers and the conviction of the corporation.

Although no criminal liability attaches to the stockholders in the sense that the stockholders can be brought into court to answer for the criminal act of the juristic entity that they own,⁶⁰ nevertheless, the stockholders are really the ones who are punished when a corporation is convicted.⁶¹ The only way a corporation can be punished in criminal court is by payment of a fine, resulting in a depletion of its assets. Therefore, the stockholders are indirectly punishable for the crimes of the corporation by smaller dividends or a reduction of their equitable interest.

53. 18 U.S.C. § 371 (1952).

54. FLA. STAT. § 833.01 (1955).

55. *United States v. Bazzell*, 187 F.2d 878 (7th Cir. 1951), cert. denied 342 U.S. 913 (1952), rehearing denied 342 U.S. 889 (1952) aff'd 342 U.S. 913 (1952); *Blackburn v. State*, 83 So.2d 694 (Fla. 1956) cert. denied 350 U.S. 987 (1956).

56. See *American Medical Ass'n v. United States*, 130 F.2d 233 (D.C. Cir. 1942).

57. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 25 (1928).

58. 153 F.2d 816 (7th Cir. 1946), cert. denied (2 cases) 328 U.S. 836 (1946).

59. 130 F.2d 233 (D.C. Cir. 1942).

60. *Union Pacific Coal Co. v. United States* (8th Cir. 1900), 173 Fed. 737, wherein the court said, at p. 739:

A corporation is . . . another and different person from any of its stockholders, whether they are corporations or individuals; and no corporation can, by violating a law, make any one of its stockholders who does not himself participate in that violation criminally liable therefor.

61. See Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1 and 181 (1928).

Comment was made on this vicarious liability of the stockholder in a federal case⁶² by the eminent Judge Learned Hand, who said:

The company protests against the fine levied against it. It argues that this merely takes from the victims of the fraud, assuming that there was a fraud, part of the little that was left them. We agree. Why it should promote observance of the law to put into the treasury money of which innocent persons have been robbed, is not apparent. But it is a matter with which we have nothing to do; the company was a juristic person to which, by a fiction, criminal responsibility is imputed. It could commit a crime and be punished in the only way it could be made to suffer. Where the burden falls, the trial judge must consider; we have no power to change his decision. So far as our opinion may be thought of consequence in other cases, we may however say that when the company is insolvent, as it always is, we can see no good reason for more than nominal punishment.

Stockholders also may be held liable in their individual capacities for a fine levied against a corporation by means of a creditors' bill when the property and assets of the corporation have been distributed to them after indictment and before conviction.⁶³

SPECIFIC VIOLATIONS

The 1957 Florida Legislature passed a law⁶⁴ which is a significant first step toward what must eventually be a strict set of rules for all who do business with agencies of the state. That law reads as follows:

Whoever, in any matter within the jurisdiction of the Florida Securities Commission knowingly and willfully and with intent to defraud falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than ten thousand dollars (\$10,000.00) or imprisoned not more than five (5) years, or both.

This law is of current interest to those who deal with the Florida Securities Commission. The statute is a plainly-worded caveat; it is broad in its terms, the courtroom history of the federal statute⁶⁵ from which it was apparently taken⁶⁶ leaves little doubt that its broad terms blanket the subject with which it deals.

62. *United States v. Cotter*, 60 F.2d 689 (2d Cir. 1932).

63. *Pierce v. United States*, 255 U.S. 398 (1921), *affirming* 257 Fed. 514, (8th Cir. 1919), 260 Fed. 158 (8th Cir. 1919).

64. Laws of Fla. c. 57-748 (1957).

65. 18 U.S.C. § 1001 (1952).

66. Conversation between the writer and Walter H. Robinton, Chief Field Examiner, Florida Securities Commission, indicates that when this bill was first presented for consideration it was broad enough to cover all state agencies; the Legislature, however, would not buy it in that form.

This law⁶⁷ is one of which no incorporator, corporate officer or director can afford to be ignorant; that is, of course, if the plans of the corporation in question include the types of securities sales with which the Florida Securities Commission is obliged to interest itself. A glance at the cases which have been brought under the comparable and more-encompassing federal statute⁶⁸ makes it clear that both corporations and natural persons are included in its prohibitions.⁶⁹

It then becomes incumbent upon all persons who have occasion to prepare and use the required forms or confer with agents of the Commission to be scrupulously careful to tell the truth, not misrepresenting the facts in any *material respect*. To be safe, it should be assumed that all statements made in connection with registrations and sales are material when the inquiry comes from the Commission.

It is to be noted that the first clause of the new Florida law⁷⁰ contains the phrase "a material fact"; whereas, the second clause which relates to the making and using of a false writing or document⁷¹ contains no such reference to the materiality of the "false, fictitious or fraudulent statement or entry" therein. Of course this law has scarcely been on the books long enough for a test, and to date there has been none; however, the substantially similar wording of this statute and the federal statute⁷² compels the conclusion that the Florida courts will interpret this law as the federal courts have interpreted its putative parent.⁷³

The federal courts have consistently held that the "false, fictitious or fraudulent statement or entry" in question must be material.⁷⁴

It is important to note that sins of omission are viewed just as dimly in the words of this statute⁷⁵ as are the affirmative false statements. The most important thing to keep in mind when drafting, filling out or using one of the documents or forms required by the Commission is the purpose behind the registration legislation: the protection of the public by full disclosure. As the Florida Supreme Court has said the purpose of such

67. See note 64 *supra*.

68. 18 U.S.C. § 1001 (1952).

69. See also 1 U.S.C. § 1 (1952) and FLA. STAT. § 1.01(3) (1955).

70. See note 64 *supra*.

71. The writings or documents which are required to be used, (to name a few) and in the preparation of which the false-statement statute should be kept in mind, are the application (or registration statement), the announcement of intention to trade, the statement of the capitalization of the issuer, the financial statement or balance sheet, the detailed statement of the plan upon which the issuer proposes to transact business, and the various other statements and documents required by law, or which the Commission may prescribe under its general power to prescribe forms and require information. These forms and documents are discussed elsewhere in this issue.

72. 18 U.S.C. § 1001 (1952).

73. *Id.*

74. *Weinstock v. United States*, 231 F.2d 699 (D.C. Cir. 1956); *Cohen v. United States*, 201 F.2d 386 (9th Cir. 1953), *cert. denied* 345 U.S. 951; *Todorow v. United States*, 173 F.2d 439 (9th Cir. 1949).

75. Laws of Fla. c. 57-748 (1957).

legislation ". . . is to protect investors in securities not from financial loss generally, but from fraud."⁷⁶ The lawyer whose clients include corporations and persons who conduct their business through corporations and/or assume an active part in their management should become familiar with the pitfalls of criminal nature which are integrated into the Florida Blue Sky legislation, otherwise known as the Uniform Sale of Securities Law.⁷⁷

The pitfalls are many; in addition to the law regarding false statements to the Commission discussed above,⁷⁸ there is the general penalty provision of the Act which reads as follows:⁷⁹

Whoever violates any of the provisions of this chapter shall be guilty of a felony and upon conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment in the state penitentiary for not more than five years. The statute of limitations for prosecution of offenses committed under this chapter shall be five years.

This rather stiff criminal sanction is in addition to the sanctions of a civil nature which are available to the Commission and private persons under the law which are discussed elsewhere in this issue.⁸⁰

Where the criminal provisions become most important is in connection with the sale of securities, the regulation of which is, of course, the purpose of the Act. Section 517.07 of the Act, *Registration of securities*, provides in part, "No securities except of a class exempt under any of the provisions of Section 517.05 or unless sold in any transaction exempt under any of the provisions of Section 517.06 shall be sold within this state unless such securities shall have been registered as hereinafter defined . . ." It is then obvious that the definition of terms is the keystone. What is a sale? What is meant by registration? What are exempt classes of securities? What are securities?⁸¹ What are the exempt transactions? The lawyer must be able to answer all of these questions,⁸² and many more, for his client.

Ten terms used frequently in this law are defined in section 517.02. Important to this discussion is the definition of the word "person"⁸³ which includes, *inter alia*, ". . . a corporation created under the laws of this or any other state, country, sovereignty, or political subdivision thereof. . . ."

76. *State v. Minge*, 119 Fla. 515, 160 So. 670, 675 (1935).

77. FLA. STAT. § 517 (1955).

78. *Ibid.*

79. FLA. STAT. § 517.30 (1955).

80. 12 U. MIAMI L. REV. 1 (1957).

81. See *State v. Hemphill*, 142 Fla. 728, 195 So. 915 (1940) which says that because of the extensive list given in FLA. STAT. ANN. § 517.02 (1955) under the definition of "security," the supreme court should examine the scheme adopted by the Legislature for the protection of investors in order to determine their real purpose..

82. See Robinton & Sowards, *Florida's Blue Sky Law: The Lawyer's Approach*, 6 MIAMI L.Q. 525, 527-529 (1952).

83. FLA. STAT. § 517.02(2) (1955).

The term "security" as defined in the Act goes somewhat beyond the meaning which the term conjures up in the minds of the public as a whole, and indeed the legal minds.⁸⁴ That definition brings within the compass of the law many types of instruments which one would not expect to be included. This has been discussed in a previous issue of the *Miami Law Quarterly*.⁸⁵ There the question is posed as to whether pieces of paper not enumerated in the definition might be called securities, and the conclusion is reached that this might well happen because of the use of general terms therein, such as ". . . interests in or under a profit-sharing or participation agreement or scheme. . . ."

All the definitions are important, of course, but even when the lawyer has familiarized himself with their content the problem is far from being solved. The application of the terms to the later sections relating to registration, sales, exempt transactions and exempt securities places a burden on those who intend to deal in securities or advise their clients relative thereto. Keeping in mind the broad coverage of the penal provisions it behooves the intender and his lawyer to tread cautiously. An important practical consideration is that the Commission is always ready to help the public to interpret the law in the light of any given fact situation.⁸⁶

Generally the problem unfolds thus: (1) Is it a security? (2) Is it a sale? (3) If so, is it an exempt security? (4) If not, is it an exempt transaction? (5) If not an exempt security or exempt transaction, how must registration be accomplished? Announcement? Notification? Qualification? (6) After registration has been accomplished, who can sell it and in what capacity? (7) What is necessary to qualify one as a dealer? (8) —as a salesman?

After the first six questions have been disposed of and the securities are ready to be sold to the public the dealers and salesmen become the actors. A corporation can be a dealer,⁸⁷ but cannot be a salesman,⁸⁸ and the executive officers of a corporation are not salesmen within the meaning of the term as defined in the act.⁸⁹ This is logical because a corporation acts through its officers; therefore, when the executive officers sell a security the corporation-dealer is making the sale. Others employed by the corporation-dealer to sell securities must be registered as salesmen. It is important to note here that when a corporation seeks or intends to issue securities required to be registered in other than exempt transactions

84. FLA. STAT. § 517.02(1) (1955); See also *State v. Hemphill*, note 81 *supra*.

85. See note 82 *supra*.

86. Conversation between the writer and Walter H. Robinson, Chief Field Examiner, Florida Securities Commission.

87. FLA. STAT. § 517.02(4)(d) (1955).

88. FLA. STAT. § 517.02(6) (1955).

89. *Ibid.*

the corporation-issuer is deemed to be a dealer and must comply with the provisions of the act relating thereto.⁹⁰

Another prime consideration is the practical fact of the existence in Florida of a highly developed liaison between the state and federal authorities on securities matters; this spirit of cooperation is especially important for the purposes of our discussion as it obtains among the state and federal securities commissions and the postal inspectors.

This attitude is embodied in the Florida Statutes section 517.28 (1955) which states in part:

The securities commission may make any reasonable rules and regulations which it may deem necessary to cooperate effectively with . . . any . . . agency of the United States government which may have supervision or control over the sale of securities in interstate commerce under any law of the United States. . . .

It is a natural and logical result that such a situation should exist, since often where there has been a violation of state securities laws there has likewise been a violation of federal law, and because a large part of the business dealings in this age take place through the use of the mails. Where the element of fraud appears as a factor, or the obtaining of money or property by false pretenses is turned up in an investigation, and the mails have been used the postal inspectors are available with their talent and facilities to assist in instigation of the prosecution of those offenders.

Such cooperation as is mentioned above extends in many practical directions. Suppose, for example, that a foreign corporation is the issuer of securities which are being hawked in Florida and a situation arises which results in a criminal investigation being instituted by the state. There is a provision in the Florida Securities Law⁹¹ requiring consent to service to be filed on behalf of such issuer upon application for registration by notification under Florida Statutes section 517.08 (1955), made by an issuer, or upon application for registration by qualification under section 517.09 by an issuer or registered dealer. This section⁹² calls for filing of an irrevocable consent, that for purposes of all legal process pertinent to violations of the Blue Sky Law, service on the designated state officials is service on the corporation. If, however, the foreign corporation should refuse to comply with the process, the state would be at a loss because its compulsory process does not extend beyond its territorial borders. At this point the cooperation between state and federal authorities becomes important. If the situation involves possible violations of federal statutes the federal grand jury could subpoena the pertinent books and

90. FLA. STAT. § 517.12(8) (1955).

91. FLA. STAT. § 517.10 (1955).

92. *Ibid.*

records for its consideration; this process could not be refused,⁹³ for the process of the federal courts extends throughout the country.⁹⁴ Once the books and records arrive, it is just possible that they might be "borrowed" by the state authorities and searched for evidence of state violations and leads to witnesses and other evidence.

The preamble to the Securities Act of 1933⁹⁵ indicates that its general purpose is the same as other securities laws including the Florida Blue Sky legislation; it states its purpose to be: "to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof. . . ." The Act, as amended, provides both civil and criminal liabilities as to persons and corporations connected with the issuance, underwriting and sale of securities.

The penalty provision⁹⁶ contains the requirement that in order for criminal liability to attach the violation must be willful. This section makes it a crime to violate willfully "any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission. It also provides specifically that it is a violation to willfully make false representations and omissions of material facts in registration statements. Thus there are two categories into which violations fall: violations of the fraud and registration provisions, and violations of the rules and regulations.

The fraud provisions of the Act are found in Title 15, United States Code section 77q (1933); the language therein used is similar to the Federal Mail Fraud Statute⁹⁷ and the Interstate Wire Fraud Statute,⁹⁸ and it has been held that section 77q does not impliedly repeal the provisions of the Mail Fraud Statute.⁹⁹ Decisions construing these fraud provisions have clearly defined the scope and operations of this Act,¹⁰⁰ and have withstood all contentions that it is unconstitutional.¹⁰¹

93. U.S. CONST. amend. V with respect to privilege against self-incrimination does not apply to corporations. See note 32 *supra*.

94. FED. R. CRIM. P. 17.

95. 48 STAT. 87 (1933), 15 U.S.C. §§ 77a-77aa (1952).

96. 48 STAT. 87 (1933), 15 U.S.C. § 77x (1952).

97. 18 U.S.C. § 1341 (1952).

98. 18 U.S.C. § 1343 (1952).

99. *Edwards v. United States*, 131 F.2d 198 (10th Cir. 1942), *cert. denied* 317 U.S. 689 (1942); *United States v. Rollnick*, 91 F.2d 911 (2d Cir. 1937).

100. *Nemec v. United States*, 191 F.2d 810 (9th Cir. 1947); *Landay v. United States*, 108 F.2d 698 (6th Cir. 1939); *Pace v. United States*, 94 F.2d 591 (5th Cir. 1938); *Coplin v. United States*, 88 F.2d 652 (9th Cir. 1937).

101. *United States v. Monjar*, 147 F.2d (3d Cir. 1944), *cert. denied* 325 U.S. 859 (1945); *Kopald-Quinn v. United States*, 101 F.2d 628 (5th Cir. 1939), *cert. denied* 307 U.S. 628 (1939); *Bogy v. United States*, 96 F.2d 734 (6th Cir. 1938), *cert. denied* 305 U.S. 608 (1938); *SEC v. Jones*, 85 F.2d 17 (2d Cir. 1936), *cert. denied* 299 U.S. 581 (1936).

To constitute a violation of section 77q (a) the following elements must be present: it must be willful;¹⁰² there must be a sale¹⁰³ of a security¹⁰⁴ within the meaning of Title 15, United States Code section 77b (3) (1952); there must be a use of the mails,¹⁰⁵ or any means or instruments of transportation or communication in interstate commerce;¹⁰⁶ there must be an employment of a device, scheme or artifice to defraud, or the employment of other practices set out in paragraphs 2 and 3 of section 77q (a).¹⁰⁷ No securities are exempt from this fraud section, and it has been held that its provisions apply to shipments of forged bonds in interstate commerce.¹⁰⁸

Section 77q (b), which does not require the existence of a device, scheme or artifice to defraud, is designed to combat the so-called "tip sheet" as well as circular letters and articles in newspapers, magazines and such other media purporting to give an unbiased opinion on securities when in fact such opinions are given for a past or prospective consideration. If any consideration is given or promised for the opinion it must be fully disclosed.

Section 77q is not directed solely against interstate transactions, but covers wholly intrastate transactions if the mails are employed;¹⁰⁹ it does not require that a securities dealer state every fact about a stock offered that a prospective purchaser might like to know or might if known tend to influence his decision, but does require a dealer not to omit or shade material facts necessary in order to make the statements made, in the light of the circumstances, not misleading.¹¹⁰

That a scheme to defraud would not have deceived one of ordinary intelligence is not a valid defense.¹¹¹ Further criminal provisions found in section 77e (a) (1) and (2) makes unlawful certain practices therein enumerated unless a registration statement is in effect. A registration statement under this section is not "in effect" where its effectiveness has been suspended or where it has been revoked. The registration statement

102. 48 STAT. 87 (1933), 15 U.S.C. § 77x (1952); *Stone v. United States*, (reversed on other grounds) 113 F.2d 70 (6th Cir. 1940).

103. *Bogy v. United States*, see note 101 *supra*.

104. *SEC v. Joiner Leasing Corp.*, 320 U.S. 344 (1943); *Atherton v. United States*, 128 F.2d 463 (9th Cir. 1942); *United States v. Riedel*, 126 F.2d 81 (7th Cir. 1942).

105. *Kopald-Quinn v. United States*, note 101 *supra*.

106. *Coplin v. United States*, see note 100 *supra*; *Kelling v. United States*, 193 F.2d 299 (10th Cir. 1951).

107. *Holmes v. United States*, 134 F.2d 125 (8th Cir. 1943), *cert. denied* 319 U.S. 776 (1943).

108. *Seeman v. United States*, 90 F.2d 88 (5th Cir. 1937) (reversed on other grounds), but see *Seeman v. United States*, 96 F.2d 732 (5th Cir. 1938), *cert. denied* 305 U.S. 620 (1938).

109. *Holmes v. United States*, note 107 *supra*; *SEC v. Timetrust, Inc.*, 28 F.Supp. 34 (N.D. Cal. 1939).

110. *Otis & Co. vs. SEC*, 106 F.2d (6th Cir. 1939).

111. *SEC v. Timetrust, Inc.*, note 109 *supra*.

referred to means, of course, a registration statement filed with the SEC.¹¹² The elements of a violation under this section are the use of the mails or instruments of interstate commerce, a sale or offer to sell and the fact that a registration statement is not in effect.

Title 15 United States Code section 77e, (b) (1) (1952) makes it unlawful to use the mails or means of interstate commerce to transport a prospectus which does not meet the requirements of section 77j which provides the information required to be included in the prospectus. Section 77e (b) (2), prohibits the transportation in interstate commerce or through the mails, of a security unless preceded or accompanied by a prospectus meeting such requirements. Sections 77c and 77d provide that certain securities and transactions are exempt from the provisions of section 77e; however, section 77q still applies to such securities and transactions. Section 77x contains the provision hereinbefore discussed¹¹³ relating to false statements and omissions in registration statements.

With respect to violations of the rules and regulations of the Commission prohibited by section 77x it is to be noted that the rules and regulations are primarily concerned with questions of exemption from registration and with the material which is required to be filed in connection herewith. Accordingly, these rules become pertinent in connection with criminal prosecutions for the most part only when a violation of section 77e or a false filing is involved.

The Interstate Commerce Act and legislation amendatory thereto¹¹⁴ contains some criminal provisions¹¹⁵ which are out of the ordinary in that the violation with respect to the corporation is a misdemeanor, and with respect to any natural person is a felony.

Another federal criminal statute which bears discussion is the Mail Fraud Statutes¹¹⁷ under which a corporation can be charged. This statute is a powerful weapon in the fight against con men and sharp promoters,

112. *Kaufman v. United States*, 163 F.2d 404 (6th Cir. 1947), *cert. denied* 333 U.S. 857 (1948); *Danziger v. United States*, 161 F.2d 299 (9th Cir. 1947), *cert. denied* 332 U.S. 769 (1947); *United States v. Bronson*, 145 F.2d 939 (2nd Cir. 1944); *SEC v. Chinese Consol. Ass'n.*, 120 F.2d 738 (2nd Cir. 1941), *cert. denied* 314 U.S. 618 (1941); *Jones v. SEC*, 298 U.S. 1 (1936).

113. See p. 57 *supra*.

114. 49 U.S.C. §§ 1 through 1022 (1952).

115. 49 U.S.C. §§ 1, 41(1) (1952).

116. *E.g.*, 49 U.S.C. § 41 (1):

... [E]very person or corporation . . . who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebate, concession or discrimination shall be deemed guilty of a *misdemeanor*, and on conviction shall be punished by a fine of not less than \$1,000 nor more than \$20,000: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title . . . who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. . . . (Emphasis supplied)

117. 18 U.S.C. §§ 1341, 1342 (1952).

and the number of reported cases which have been brought thereunder indicates that the weapon has been frequently wielded with effectiveness. The postal inspectors with their country-wide facilities are constantly investigating allegations of persons who claim to have been swindled. The fact that it is almost impossible to carry out a large scale swindle without using the mails is a factor which contributes to the large number of cases presented under this statute.

Although criminal statutes are subject to strict construction, the word "defraud" is construed broadly.¹¹⁸ This section was designed to protect the gullible, the ignorant, and the over-credulous as well as the more skeptical;¹¹⁹ the standard of gullibility not being that of a reasonably prudent businessman, but that of a kindly old widow with little business acumen.

The Mail Fraud Statute is important to this discussion for the reason that the reported cases have frequently involved corporations and corporate officers; hence, a corporate officer should be acquainted with the liabilities thereunder. As in the case of other statutes, it is a question of participation and not negligence alone.¹²⁰ It is sometimes difficult to extricate oneself from the web of circumstantial evidence and no doubt innocent non-participants have been swept into jail with their guilty co-defendants because of the misdeeds of the latter.

The elements of the offense under this section are a scheme to defraud or for obtaining money or property by means of false pretenses and the use of the mails for the purpose of executing such scheme or attempting to do so.¹²¹

It is not necessary that the scheme be successful¹²² and it is not necessary to prove communication of the alleged false representations to the victims.¹²³ Similarly, it is not essential that the scheme contemplate the use of the mails, it is enough if the scheme actually embraces it.¹²⁴ It is sufficient to show that during the course of executing the scheme the mails were used;¹²⁵ it not being necessary that there was any correspondence between the victims and the defendant.

118. *United States v. Buckner*, 108 F.2d 921 (2d Cir. 1940) *cert. denied* 309 U.S. 669 (1940).

119. *United States v. Sylvanus*, 192 F.2d 92 (7th Cir. 1951), *cert. denied* 342 U.S. 943 (1952).

120. *United States v. Foster*, 10 F.2d 577 (N.D. Tex. 1926).

121. *Palmer v. United States*, 229 F.2d 861 (10th Cir. 1955); *cert. denied* 350 U.S. 996 (1956), *rehearing denied* 351 U.S. 958 (1956); *Henderson v. United States*, 202 F.2d 400 (6th Cir. 1953), *rehearing denied* 204 F.2d 126 (6th Cir. 1953); *Kann v. United States*, 323 U.S. 88 (1944); *Graham v. United States*, 120 F.2d 543 (10th Cir. 1941); *Muench v. United States*, 96 F.2d 332 (8th Cir. 1938).

122. *Henderson v. United States*, note 131 *supra*.

123. *United States v. Scoblick*, 124 F. Supp. 881 (M.D.Pa. 1954).

124. *United States v. Cohen*, 145 F.2d 82 (2nd Cir. 1944), *cert. denied* (5 cases) 323 U.S. 799 (1944).

125. *Palmer v. United States*, note 121 *supra*; *Badders v. United States*, 240 U.S. 391 (1916).

Under both the Mail Fraud Statute and Title 15 United States Code section 77q (1933) relating to securities frauds, each separate mailing constitutes a separate offense,¹²⁶ and frequently there are numerous mailings, making possible tremendous fines and long sentences. (\$1,000 or 5 years or both, for mail fraud, and \$5,000 or 5 years or both for violation of section 77q.)¹²⁷

LIMITATIONS OF PROSECUTIONS

The Florida statute of limitations¹²⁸ insofar as it is pertinent to prosecutions against corporations is two years; the federal statute is five years.¹²⁹ These general provisions pertain unless the particular criminal statute under consideration contains its own limitation, or other provision is made therefor. It is to be noted that the Florida Blue Sky law has a limitation of five years,¹³⁰ as does the law prohibiting false statements to the Florida Securities Commission.¹³¹

The Florida statute on limitations of prosecutions makes provision for re-indictment or refile of an information after the period of years has run where an indictment has been found or an information has been filed within the applicable period and such indictment or information has been quashed or set aside because of some defect, omission or insufficiency in the contexts or the form of the same. It requires that the new charge be brought within three months after entry of the order quashing or setting aside the indictment or information. The federal statutes¹³² relating to the same subject matter provide, in the case where the defect is found after the period of limitations has run,¹³³ that a new indictment "may be returned not later than the end of the next succeeding regular term of court, following the term at which such indictment was found defective or insufficient." Where the defect is found before the period of limitations has run and "such period will expire before the end of the next regular term of the court to which such indictment was returned, a new indictment may be returned not later than the end of the next succeeding regular term of such court following the term at which such indictment was found defective or insufficient."¹³⁴

126. 48 STAT. 87 (1933), 15 U.S.C. § 77x (1952).

127. *Ibid.*

128. FLA. STAT. § 932.05 (1955).

129. Offenses not capital. 18 U.S.C. § 3282 (1952).

130. FLA. STAT. § 517.30 (1955).

131. LAWS OF FLA. c. 57-748 (1957).

132. 18 U.S.C. §§ 3288, 3289 (1952).

133. *Id.* at § 3288.

134. *Id.* at § 3289.

The federal statute on limitations of prosecutions¹³⁵ provided for a three-year period until it was amended effective September 1, 1954, when it was changed to five years. When the crime charged is alleged to have been committed prior to the effective date of the new limitation the accused will sometimes try to convince the court that the old three-year period should apply; however, Congress provided in a succeeding section of the act which changed the period¹³⁶ that the five-year limitation "shall be effective with respect to offenses (1) committed on or after the date of this Act, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provisions of law in effect prior to such date."

CONCLUSION

This article is not meant to be an exhaustive work on the subject it considers; however, the writer hopes that it may be of some small help to the lawyer who must advise corporate clients suggesting some of the problems which might have occasion to arise. Of course many specific violations have not been considered and many aspects of a corporation's criminal liability have received only cursory treatment; this is to be expected when a subject of such broad scope is considered in such a short space. If the article is instrumental in saving one innocent stockholder from having his dividend check eroded by reason of his vicarious liability for a fine levied against his corporation the writer will consider his time well spent.

135. See note 129 *supra*.

136. 18 U.S.C. § 106 (Supp. IV, 1957).